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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1071~~ 78

DEPARTMENT OF EMPLOYMENT AND
BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT
OF THE DEPARTMENT OF EMPLOYMENT, Appellants,

VS.

THE UNITED STATES OF AMERICA, AND
THE AMERICAN NATIONAL RED CROSS, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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THE UNITED STATES OF AMERICA, AND
THE AMERICAN NATIONAL RED CROSS, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Colorado, entered on September 8, 1965 with a supplemental judgment entered on September 15, 1965, permanently enjoining the Appellant from assessing or collecting any contributions, taxes, interest, or penalties, against or from the Appellee, The American National Red Cross under the *Colorado Employment Security Act, Chapter 82, Colorado Revised Statutes, 1963* and further directing that the Appellant be directed to refund to the Appellee, The American National Red Cross the sum of $27,927.79 for previous taxes paid

by the Appellee, The American National Red Cross to the Appellant. The Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the District of Colorado has not been reported. Copies of the Findings of Fact and Conclusions of Law and Supplemental Conclusion of Law and Judgment of the District Court are attached hereto as Appendix A.

JURISDICTION

This suit was brought under *Title 28 U.S.C., Sections 1331, 1345* for the purpose of determining whether or not the Appellee, The American National Red Cross was entitled to a refund of taxes paid to the Appellant, which exceeded the sum of $10,000 at the time the action was commenced; the Appellee, The American National Red Cross further sought to permanently enjoin the Appellants, their officers, agents, servants, employees and attorneys from assessing or collecting any contributions, taxes, interest, or penalty, under the *Colorado Employment Security Act, Colorado Revised Statutes, 1963;* and for the further purpose of seeking a judicial declaration that the *Colorado Employment Security Act,* supra, was unconstitutional as to its application against the Appellee, American National Red Cross. The judgments of the three judge District Court were entered September 8, 1965 and September 15, 1965. The Appellants filed their notice of

appeal in that Court on November 15, 1965. The District Court subsequently granted the Appellants an Extension of Time up to and including March 1, 1966 in which to file their judicial statement with the Supreme Court. The jurisdiction of the Supreme Court is conferred by *Title 28, U.S.C., Section 1253.*

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Paul v. U. S., 83 S. Ct. 426, 371 U. S. 245, 9 L. Ed² 292; Radio Corp. of America vs. U. S., 71 S. Ct. 806, 341 U. S. 412, 95 L. Ed 1062. U. S. vs. Georgia Public Service Comm., 83, S. Ct. 397, 371 U. S. 285, 9 L. Ed.² 317.*

QUESTIONS PRESENTED

The following questions are presented on appeal to this Court:

1. Where a state statute affords an adequate remedy and requires that an employer contesting his liability under the *Colorado Employment Security Act, Chapter 82, Colorado Revised Statutes, 1963,* file his suit for refund of taxes in the State District Court in and for the City and County of Denver, State of Colorado, is the Appellee, American National Red Cross, precluded from obtaining relief in the United States District Court because it failed to avail its self of and comply with the state's statutory requirements. In the alternative if the Supreme Court were to find that the said State District Court did not have original jurisdiction because of the fact that the Appellee is an instrumentality

of the United States, (See question number 2, infra.) then the only court having original jurisdiction of this suit would be the Supreme Court of the United States; *(U.S.C. Constitution, Article 3, Section 1, Section 2, cls. 1, 2.)* in neither event would the United States District Court have original jurisdiction in this suit.

2. Whether the Appellee, American National Red Cross is an instrumentality or an agency of the United States.

3. Whether the Congress of the United States by its 1960 amendments to the *Federal Unemployment Tax Act* has waived the constitutional immunity of the Appellee, American National Red Cross from the taxation provision of the *Colorado Employment Security Act, Colorado Revised Statutes, 1963.*

STATUTES INVOLVED

The following federal statutes are involved:

1. Title 10 U. S. C. Section 2602 (e), July 17, 1953, Ch. 222, sections 1, 2, 7, 67 Stat. 178, 179.

2. Title 26 U. S. C. Section 3301, September 13, 1960 Pub. L. 86-778, Title V Section 523 (a), 74 Stat. 980.

3. Title 26, U. S. C. Section 3305 (b), September 13, 1960, Pub. L. 86-778, Title V, Section 531 (a) (b), 74 Stat. 983.

4. Title 26 U. S. C. Section 3306 (c) (6) (8) September 13, 1960, Pub. L. 86-778, Title V, 74 Stat. 983, 984, 986.

5. Title 28 U. S. C. Section 1251, June 25, 1948 c. 646, 62 Stat. 927.

6. Title 36 U. S. C. Section 2, May 8, 1947 c. 50, Section 3, 61 Stat. 81.

7. Title 36 U. S. C. Section 7, July 17, 1953, c. 222 Section 5, 67 Stat. 179.

8. Title 42 U. S. C. Section 1855 a. September 30, 1950, c. 1125 Section 2, 64 Stat. 1109.

The following state statutes are involved:

1. Colorado Revised Statutes, 1963.

Section 82-1-3 (8) (e)

Section 82-9-9

STATEMENT

The Appellee, The American National Red Cross (hereinafter referred to as "Red Cross") is organized and exists by virtue of an Act of the Congress of the United States of America, *(Title 36, U.S.C., Section 1, et seq.)* which provides that it is a body corporate politic in the District of Columbia. The Red Cross does not have its principal place of business in the State of Colorado, however, it has a number of chapters in the State of Colorado which employ a considerable number of employees in said state. The Appellant, Department of Employment is an agency of the State of Colorado, charged with the function of administering the *Colorado Employment Security Act* for the State of Colorado *(Chapter 82, Colorado Revised Statutes, 1963.)* The Appellent, Bernard E. Teets is the Executive Director of the Colorado Department of

Employment and as such is the head of the Department of Employment.

The State of Colorado is one of three states which taxes non-profit organizations for unemployment taxes under its Employment Security Act. The Department of Employment is also authorized by the Colorado legislature to tax agencies or instrumentalities of the United States government under the provisions of *Section 82-1-3 (8) (e), Chapter 82, Colorado Employment Security Act, Chapter 82, Colorado Revised Statutes, 1963,* in instances where immunity is waived by the Congress of the United States.

Prior to the commencement of this suit, the Department of Employment determined that the Appellee, Red Cross, was subject to the Colorado Employment Security Act, supra, and demanded payment of unemployment taxes by the Red Cross and its chapters be made together with interest thereon, provided for by the *Colorado Employment Security Act,* supra.

Thereafter, and prior to commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest by the Red Cross to the Department of Employment. Each of said payments was accompanied by an application for refund, each of which was denied by the Department of Employment prior to the commencement of this suit. Subsequent to the denial of the refunds by the Department of Employment, the Red Cross commenced this suit in the United States District Court, for the District of Colorado joining with them the United States of America as a party plaintiff.

In its Complaint, the Red Cross alleged that it was an

instrumentality of the United States, the kind described by *Title 26, U.S.C., Section 3306, (c) (6) (B)*, and, as such continues, because of the express exception made in *Title 26, U.S.C. 3305 (b)* to be immune under the Federal Constitution, from any requirements to make contributions to any state for unemployment compensation taxes. The Red Cross further contended that it was an instrumentality of the United States of the kind described by *Title 26, U.S.C., Section 3306 (b) (6) (B)* because of the provisions of *Title 26, U.S.C., Section 3306 (c) (8)* which they contended specifically exempted the Red Cross from taxation under the Federal Unemployment Tax Act, *(Title 26, U.S.C., Section 3301 et. seq.)*

The United States of America was joined as a party plaintiff in this suit under the direction and authorization of its Attorney General because of its interest as a sovereign in having *Section 3305 (b) and Section 3306 (c) (6)* supra, properly construed and applied and avoiding infringement of the immunity from state and local taxation, which the United States and Red Cross, as its alleged instrumentality, performing functions essential to the military and civil interests of the United States allegedly enjoy under the Federal Constitution.

Subseqeut to the filing of the Complaint, the Department of Employment moved to strike the United States of America as a party plaintiff; moved to dismiss the Complaint of Red Cross on the grounds that the Court did not have jurisdiction over the subject matter or the parties. The Appellees filed a Motion for Summary Judgment contending that the suit was one the District Court could decide without determination of factual issues and without the need of the Department of Employment filing its

Answer. The District Court denied the Red Cross Motion for Summary Judgment, granted the motion of the Department of Employment to strike the United States of America as a party plaintiff and denied the motion of the Department of Employment to dismiss the claim of the Red Cross.

Thereafter, the Department of Employment filed its Answer denying that the Red Cross was an instrumentality of the United States government and alleging in the alternative, that if the Court found that the Red Cross was an instrumentality of the United States that it was not exempt from taxation under the *Colorado Employment Security Act,* supra, because the Congress of the United States has not specifically exempted it under the provisions of *Title 26, Section 3305 and 3306* of the *Federal Unemployment Tax Act.* The Appellants in their Answer as a separate and affirmative decision alleged that the District Court did not have jurisdiction over the subject matter and that the District Court did not have jurisdiction over the Appellants. Upon presentation of evidence and oral arguments the District Court sitting as a Three Judge Court, ruled the United States of America was a proper party plaintiff to this action; thereby reinstating the United States as a party plaintiff; that the Red Cross was an instrumentality of the United States, and that its immunity as a federal instrumentality had not been waived by the Congress of the United States in its 1960 amendments of the *Federal Unemployment Tax Act.*

In its Supplemental Conclusions of Law and Judgment, dated September 15, 1965, the Three Judge District Court permanently enjoined the Department of Employment and its officers, agents, and employees from assess-

ing or collecting any contributions, taxes, interest, or penalties against or from the Red Cross under the *Colorado Employment Security Act,* supra, and rendered judgment in favor of the Red Cross and against the Department of Employment in the sum of $27,927.79 together with the costs of the Red Cross taxed by the Clerk of the District Court.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents questions of first impression for the Supreme Court; namely; (1) whether the Red Cross is an instrumentality of the United States and (2) if the Red Cross is an instrumentality of the United States whether the Congress of the United States has specifically exempted the Red Cross from its general waiver of immunity of federal instrumentalities to taxation by the Department of Employment as well as other states in taxing the Red Cross for unemployment taxes. In this case the State of Colorado, Department of Employment, did not give its consent to be sued in the United States District Court. The Appellant contends that the Red Cross had an adequate statutory remedy in the state courts of the State of Colorado for a determination as to its exemption and entitlement to refund, if any, and that the determination of this question is vital. In the alternative, Appellants contend that if the Appellee Red Cross, is an instrumentality of the United States, the Supreme Court of the United States has original jurisdiction rather than the United States District Court for the District of Colorado.

The legal status of the Red Cross has yet to be determined by any appellate court in the United States. The

status of the Red Cross should be determined to decide its liability for taxation not only in the State of Colorado but in other states as well. The Red Cross is one of several organizations which gives assistance to the United States government in matters of defense, disaster, safety programs and the fact that the Congress of the United States has failed to specify its legal status necessitates judicial determination at this time.

The Congress of the United States failed to specifically exempt by name or by other reference, the Red Cross in its 1960 amendments to the *Federal Unemployment Tax Act, Title 26, U.S.C. Section 3305, 3306,* and the District Court has based its exemption of the Red Cross by reference to testimony at a Congressional Committee hearing precluding the enactment of said amendments, which otherwise make no reference to the Red Cross.

The Red Cross was not barred from commencing a suit for a refund of taxes in the state courts of Colorado, in fact it is specifically afforded a remedy under *Section 82-9-9, Colorado Revised Statutes, 1963* to apply for a refund with the Department of Employment, and upon denial thereof, it is entitled by this provision to commence its action in the District Court in and for the City and County of Denver, State of Colorado requesting a judicial determination as to its entitlement of refund, if any. It is respectfully submitted that because of its sovereignty, the State of Colorado cannot be sued, nor may process be issued without its consent in a Federal District Court. *(U.S.C. Constitution Amend. 11) State of Missouri vs. Fiske, 54 Supreme Court 18, 290 U. S. 18.* The consent of the State to be sued in its own Court will not permit suit

in a federal court. *Petty vs. Tennessee-Missouri Bridge Commission, 79 S. Ct. 785, 359 U.S. 275, 3 L. Ed' 804.*

The Congress of the United States in creating the Red Cross gave it permission to sue and be sued in its own name. *(Title 36, U.S.C., Section 2).* Under no federal statute is it allowed to sue either on behalf of the United States government or as a federal agency. It has no special status except "Citizen of Another State" as provided in *Amend. 11* of the *United States Constitution.* The Red Cross attempted to confer original jurisdiction on the District Court joining the United States as a party plaintiff, however, the sole attempt made by the United States to state a claim for relief was set forth in paragraph 12 of the Complaint; such allegations were immaterial to the claim of the Red Cross and by themselves did not state a claim for relief. The Appellee failed to show that the United States was entitled to any relief nor did the United States make any demands for any form of judgment to which the United States as a plaintiff to this suit in the District Court was entitled.

It is submitted where the jurisdiction of the federal court is invoked on the basis of diversity of citizenship as the Red Cross did in this instance, a suit to which the state has closed its doors or limited its jurisdiction may not be maintained in a federal district court in that state. *Woods vs. Interstate Realty Company, 69 S. Ct. 1235, 337 U.S. 535; State of Missouri vs. Fisk,* supra. In addition, if the state statute prescribes a particular mode of review of administrative action or decision, the Red Cross must, if aggrieved by the decision of the administrative agency, seek a judicial review in a manner prescribed and may not

invoke the original jurisdiction of another court by an independent proceeding.

Where a public instrumentality is created with the right to sue and be sued in its own name the states waiver of immunity from suit in the particular case may be restricted to suits or proceedings of a special character in the state court, not in the federal court. *Petty vs. Tennessee-Missouri Bridge Commission,* supra. A clear showing of a state's consent to a suit against itself in the federal courts of fiscal claims is required since the state has a right to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances. A state must clearly declare its consent to be sued in the federal courts before the federal court should under-take adjudication of the claims of a taxpayer against the state. *Kennecott Copper Corp. vs. State Tax Commission, S. Ct. 745, 327 U.S. 573, 90 L. Ed.' 862.*

Assuming arguendo, that the Appellee was an instrumentality of the United States and that original jurisdiction of this suit was not vested in the State District Court in and for the City and County of Denver, State of Colorado, there still remains the question of what court has original jurisdiction of this case. Where the party or one of the parties bringing the suit is the United States and the Defendant is the State of Colorado, as would be the situation here, and is evidenced by the decision of the District Court (see Appendix A), it is submitted that the Supreme Court and only this Court would have original jurisdiction. *U.S.C. Constitution, Article 3, Section 1, Section 2, cls. 1, 2.; Title 28 U. S. C. Section 1251; United States vs. State of California, 328 Fed.' 729, Cert. denied*

85 S. Ct. 34, 379 U.S. 817, 13 L. Ed.² 29. Moreover, the original jurisdiction of the Supreme Court extends to suits by the United States against the state without regard to the subject of such controversies. *U.S. vs. Texas, 143 U.S. 621, 12 S. Ct. 488, 36 L. Ed.² 285.*

The Department of Employment does not quarrel with the premise that the purpose of the Red Cross is noble and beneficial to citizens of the United States as well as those throughout the world; however, the fact that this organization has rendered assistance to the armed forces as well as other federal agencies does not per se make this organization an instrumentality of the United States government. The evidence in the record submitted to the Supreme Court is undisputed, that the Red Cross as a member of the International Red Cross is required by the latter's charter to remain independent from any government.

In one of the exhibits introduced into evidence by the Red Cross *(Annual Report 1946 American National Red Cross, page 20.)* its former chairman, Basil O'Connor stated very explicitly that the Red Cross, while cooperating closely and cordially with its own government and agencies, should at the same time remain independent from them; that the Red Cross was in no sense a part of the government.

The evidence is undisputed that the Red Cross is solely dependent upon private funds and endowments for its support; a majority of its operations and purposes are private in nature; it retains private legal counsel; subjects itself to various state controls and other forms of state taxation; it has an independent governing body; it may

hold property in its own name; and that it shall be required to reimburse the U. S. Department of Defense for audits made *(Title 36 U.S.C. Section 7.)*.

The Red Cross asserts that it is a federal instrumentality because of the assistance rendered to the United States Department of Defense and the statutory recognition given it by the Congress of the United States in this regard. However, for such purposes, the Congress has specifically provided that the Red Cross employees should not be considered as federal employees *(Title 10, U.S.C., Section 2602 (e))*. In two separate legislative acts, the Congress has specifically provided; (1) that employees of the Red Cross are not to be considered to be federal employees and that (2) Red Cross is not to be considered a federal agency. *(Title 42, U.S.C., Section 1855 (a))*. In no instance, has the Congress specifically provided that the Red Cross should be considered as an agency or an instrumentality of the United States government.

Assuming arguendo, that the Red Cross is a federal instrumentality, it is submitted that the Congress of the United States has waived its immunity from taxation in the 1960 amendments to the *Federal Unemployment Tax Act*, supra. The Congress has enabled those states who have enacted such legislation to tax federal instrumentalities *(Title 26 U.S.C., Section 3305 (b))* subject to certain exceptions contained in *Title 26, U.S.C., Section 3306 (c) (6)*, supra.

Title 26, U.S.C. 3305 (b) provides in part as follows:

"(b) *Federal Instrumentalties in General.* The legislature of any state may require any instrumentality of the United States, (other than an instrumentality to

which Section 3306 (c) (6) applies) any individual and its employee, to make contributions to an unemployment compensation law**."

Title 26, Section 3306 (6) being the exception to this waiver of immunity was amended in 1960 by Congress to provide as follows:

"(6) Service in the employment of the United States government or of an instrumentality of the United States which is—

(A) Wholly or partially owned by the United States, or

(B) Exempt from the tax imposed by Section 3301 by virtue of any provisions of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemptions;"

The only exception to this waiver of immunity relates to services performed in the employ of the United States government, or its instrumentality. This exception would, therefore, not apply to the Red Cross because the Congress has by previous legislation, specifically provided that employees of the Red Cross are not employees of the United States. *(Title 10 U.S.C. Section 2602 (e)).* Construing these two statutes together it is respectfully submitted that the Congress has made it abundantly clear that if employees of the Red Cross are not employees of the United States government, their services are not performed in the employ of the United States government or an instrumentality thereof, and as a result the Red Cross is not covered by the 1960 amendments to the *Federal Unemployment Tax*

Act. This basic obstacle must be resolved before consideration can be given to sub-paragraphs (A) and (B). The District Court failed to make a factual fining as to whether services performed by Red Cross were performed in the employ of the United States, or its instrumentality.

The Red Cross does not contend that it is wholly or partially owned by the United States, therefore, the sole remaining consideration is directed to sub-paragraph (B). The District Court held that requirements of sub-paragraph (B) were met by the fact that *Title 26, U.S.C., Section 3306 (8)* specifically applied to *Section 3301,* supra.

The District Court referred to the testimony given in a committee hearing of the Congress of the United States ruling that this constituted specific reference of the Red Cross in the 1960 amendments to the *Federal Unemployment Tax Act, (Section 3305, 3306, supra.)* however, Congress failed to make specific reference to the Red Cross in its final legislation. There is no ambiguity so far as these 1960 amendments are concerned, therefore, there was no reason to construe the legislative intent by reviewing testimony given in legislative committee hearings, conducted prior to final passage.

It is submitted that the District Court failed to properly interpret the clear intent of the Congress of the United States in waiving immunity otherwise granted federal instrumentalities under the constitution of the United States; the American Red Cross is a large organization whose legal status has yet to be resolved upon appeal.

Together with the United States of America they have

filed suit, contending that one is an agency or instrumentality of the other, against a sovereign state for refund of a large amount of taxes paid; the Appellant contends that this was a just and proper tax and that the Appellee Red Cross should be subjected to further taxation in keeping with the legislative intent of the Congress of the United States and the Colorado legislature. United States of America and the Red Cross invoked jurisdiction in a United States District Court which if allowed to stand would create a new procedural precedent. By its decision, the District Court has cloaked the Red Cross with the stature of a federal instrumentality which will have for reaching effect not only upon the Appellant, State of Colorado but other states, political subdivisions and citizens as well. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS,
Plaintiff,
vs.
DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff appeared by William Massar, Esquire, of the Department of Justice, Washington, D. C., John L. Currin, Esquire, of the General Counsellor's Office of The American National Red Cross, Washington, D. C., and Jack D. Henderson, Esquire, First National Bank Building, Denver, Colorado; the defendants appeared by James D. McKevitt, Esquire, Assistant Attorney General, Denver, Colorado.

This matter came on for trial to this District Court of three judges on June 30, 1965. The Court heard the evidence and argument of counsel and is now duly advised.

This is an action by the United States and the American National Red Cross, hereinafter referred to as "Red Cross", against the Department of Employment of the State of Colorado and its Executive Director, hereinafter referred to as the "Department".

The action seeks to have the Colorado Employment Security Act, Chapter 82 Colorado Revised Statutes 1953, declared inapplicable to the Red Cross and seeks a refund of all sums collected under the Act from the Red Cross.

Briefly stated the contentions of the parties are as follows:

Plaintiffs contend that Red Cross is an instrumentality of the United States, and as such is immune from taxation by Colorado, and Congress has not waived that immunity.

Defendants contend that the Red Cross is not an instrumentality of the United States and in any event, Congress has, by the 1960 amendments to the Federal Unemployment Tax Act, waived whatever immunity Red Cross had with respect to the application of the Colorado Employment Security Act.

The issues as set forth in the pre-trial order are as follows.

1. Whether Red Cross and its chapters are instrumentality or instrumentalities or agency or agencies of of the United States.
2. Whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act.
3. Whether the Chapters in Colorado of The American National Red Cross are each juridicial entities separate and apart from each other and from plaintiff, The American National Red Cross.

4. Whether plaintiff is precluded from obtaining relief in this Court because it has not brought suit in the District Court for the City and County of Denver as provided for in Section 82-9-9 of the Act.

5. Whether Red Cross is entitled to interest on any refunds which may be granted by this Court.

There is little dispute as to the facts. The pre-trial order contains the following statement of uncontroverted facts:

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is organized and exists by virtue of an act of the Congress of the United States of America (Title 36 USC Sec. 1 et. seq.) which provides that it is a body corporate and politic in the District of Columbia. Red Cross does not have its principal place of business in the State of Colorado.

2. The United States of America is a corporate sovereign and body politic.

3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act".

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. The Department determined that employment in

Colorado was subject to the Act and demanded that payment by Red Cross and certain of its chapters be made of the contributions and interest provided for by the Act.

6. Thereafter and prior to the commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest to defendants. Part of said payments was forwarded from the office of The American National Red Cross in Washington, D.C. and parts were forwarded from the offices of various Red Cross chapters located in Colorado. The parts forwarded by any one such office did not aggregate $10,000.

7. Each of said payments was accompanied by an application for refund, each of which was denied by defendants prior to the commencement of this action.

8. The American National Red Cross is a charitable organization described in 26 USC Section 501 (c) (3) and exempt from United States Income Tax under Title 26 USC Section 501 (a).

9. Defendants claim that if Red Cross does not make payments which they claim continue to become due under the Act, Red Cross will be subject to the penalties, interest charged and remedies for collection of contribution, interest and penalties provided for by the Act.

10. Colorado Law does not provide for interest with respect to refunded contributions under the Act.

In addition, it was admitted by the defendants at the trial that the local chapters of the Red Cross have no legal

entity apart from the plaintiff, The American National Red Cross.

The Court incorporated in its findings of fact the foregoing uncontroverted facts and admission, and in addition thereto finds the following facts.

The Red Cross' charter designates it as the organization authorized to act in matters of relief under the Treaties of Geneva and to perform all duties devolved upon a national society by each nation which has acceded to any of said treaties or conventions.

In addition, it is authorized to act in matters of voluntary relief and as a medium of communication between the people of the United States and their armed forces.

By the provisions of Title 10 United States Code, § 2602, the President may accept the cooperation and assistance of the Red Cross and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense, and pursuant to this statute the President has so utilized the Red Cross.

The Red Cross is the authorized agency for communication with prisoners of war held by unfriendly governments.

In addition to these services performed for and on behalf of the United States Government, the Red Cross is also authorized to and does carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, fire, famine, floods, and other great national calamities, and devise and carry on measures for preventing the same.

CONCLUSIONS OF LAW

The Court concludes it has jurisdiction of the subject matter of this action and of the parties thereto.

The Court concludes that the local chapters of The American National Red Cross are not separate legal entities but are integral parts of the plaintiff The American National Red Cross.

The Court concludes that The American National Red Cross is an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act, unless that immunity has been waived by the 1960 amendments to the Federal Unemployment Tax Act.

The Court concludes that the United States of America has a legal interest in this litigation and is a proper party plaintiff to this action.

The Court concludes that the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation under the Colorado Employment Security Act.

The reasons for the Court's conclusions in the latter respect are as follows:

The Federal Unemployment Tax Act (Chapter 23 of Title 26 U.S.C.) imposes a federal tax upon employment to provide a fund for unemployment compensation. However, the act recognizes the right of the states to provide and administer a fund for the same purpose under state

law, and the contributions made by employers to the state fund are by the federal act made a credit against the federal tax (see §§ 3301 and 3302).

Although instrumentalities of the United States have a constitutional immunity from state taxation, § 3305(b) of the Federal Unemployment Tax Act waived that immunity as to some instrumentalities of the United States. Prior to the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States, or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law)....., to make contributions to an unemployment fund under a State unemployment compensation law.....".

The Red Cross came within the provisions of the second exemption, being an instrumentality of the United States which was exempt from the tax imposed by § 3301 by virtute of § 3306(c) (8), which exempted from the taxes imposed by § 3301 service performed in the employ of a corporation organized and operated for charitable purposes.

However, by the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) was amended to read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306(c) (6) applies

> .....to make contributions to an unemployment fund under a State unemployment compensation law .....".

In other words, the Congress did not waive the immunity from state taxes of instrumentalities of the United States to which § 3306(c) (6) applies.

§ 3306(c) (6), as amended by the 1960 amendments, "applies to an instrumentality of the United States which is

> "exempt from the tax imposed by section 3301 by virtue of any provision of law which *specifically refers to such section*.....". (Emphasis added).

Subdivision (8) of § 3306(c), as amended by the 1960 amendments, is a "provision of law" which exempts from the tax imposed by § 3301

> "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c) (3) which is exempt from income tax under section 501(a)".

Admittedly The American National Red Cross is such an exempt organization. There remains then only the question of whether or not subdivision (8) of § 3306(c) as amended in 1960 "specifically refers to" § 3301.

§ 3301 imposes a tax on employment. § 3306(c) (8) provides that the employment described in subdivision (8) is not employment for the purposes of the Federal Unemployment Tax Act. This is only another way of saying that the employment described in § 3306(c) (8) is exempt from the taxes imposed by § 3301.

The Court concludes that § 3306(c) (8) "specifically refers to" § 3301 and that the Red Cross is exempt not only from the taxes under the Federal Unemployment Tax Act but also is immune from taxation under the Colorado Employment Security Act.

This it was the intent of the Congress that the 1960 amendments should not subject the Red Cross to either State or Federal unemployment taxes is evident from the following quotation from the legislative history found at page 12797 of Volume 106, No. 115 of the Congressional Record of Proceedings and Debates of the 85th Congress, Second Session, held on June 22, 1960, wherein Congressman Ikard, in clarification of the purposes of the 1960 amendments here under consideration, stated:

> "The American National Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such charitable corporations; hence the bill is not intended to remove the Red Cross' current exemption. Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation."

The Court concludes that the Red Cross is not precluded from obtaining relief in this court because it has not brought suit in the District Court for the City and County of Denver as provided in § 82-9-9, Colorado Revised Statutes 1953.

The Court concludes that the Red Cross is entitled to judgment against the defendants for the amounts which it and its various chapters have paid to the State of Colorado under the Colorado Unemployment Security Act, but the Red Cross is not entitled to recover any interest thereon.

IT IS ORDERED that this matter is continued for 10 days from this date for the filing of a stipulation of the parties as to the amount for which judgment should be entered. Upon the filing of the stipulation, the Clerk of the Court shall forthwith enter judgment in favor of The American National Red Cross and against the defendants in the amount stipulated.

DATED at Denver, Colorado, this 8th day of September, 1965.

BY THE COURT:

OLIVER SETH
United States Circuit Judge

ALFRED A. ARRAJ
United States District Judge

HATFIELD CHILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS,

Plaintiff,

vs.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT,

Defendants.

SUPPLEMENTAL CONCLUSIONS OF LAW AND JUDGMENT

It having been called to the Court's attention that the conclusions of law entered by the Court on September 8, 1965, concluded that The American National Red Cross was entitled to a judgment against the defendants for the amounts which it and its various chapters have paid to the State of Colorado under the Colorado Employment Security Act, but the Court made no determination as to the prayer for injunctive relief.

The Court therefore makes the following supplemental conclusions of law, to-wit:

The Court concludes that the Red Cross is entitled to a permanent injunction enjoining the defendants and their officers, agents, servants, employees, and attorneys from assessing or collecting any contributions, interests, or penalties under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statutes 1953, as amended, against or from the plaintiff, The American National Red Cross.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendants, Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment, and their officers, agents, servants, employees, and attorneys are permanently enjoined from assessing or collecting any contributions, interest, or penalties against or from the plaintiff, The American National Red Cross, under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statues 1953, as amended.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, The American National Red Cross, have judgment against the defendants in the sum of $27,927.79 and the plaintiff's costs to be taxed by the Clerk of the Court.

DATED at Denver, Colorado, this 15th day of September, 1965.

BY THE COURT:

OLIVER SETH
United States Circuit Judge

ALFRED A. ARRAJ
United States District Judge

HATFIELD CHILSON
United States District Judge

APPENDIX B

1. Title 10 U.S.C. Section 2602 (e), 67 Stat. 178, 179 is set forth as follows:

   American National Red Cross: cooperation and assistance *** (e) For the purposes of this section, employees of the American National Red Cross may not be considered as employees of the United States.

2. Title 26 U.S.C. Section 3301, 74 Stat. 980 is set forth as follows:

   There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1955 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)) after December 31, 1938.

3. Title 26, U.S.C. Section 3305 (b), 74 Stat. 983 is set forth as follows:

   (b) Federal instrumentalities in general. — The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306 (c) (6) applies), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 and (except as provided in section 5240 of the Revised Statutes, as amended (12 U.S.C., sec. 484), and as

modified by sub-section (c)), to comply otherwise with such law. The permission granted in this subsection shall apply (A) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk; (B) only if such State law makes provisions for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event such State is not certified by the Secretary of Labor under section 3304 with respect to such year; and (C) only if such State law makes provision for the payment of unemployment compensation to any employee of any such instrumentality of the United States in the same amount, on the same terms, and subject to the same conditions as unemployment compensation is payable to employees of other employers under the State unemployment compensation law.

4. Title 26 U.S.C. Section 3306 (c) (6) (8), 74 Stat. 983, 984, 986 is set forth as follows:

(c) Employment. — For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either. (A) within the United States, or (B) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, except—***

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is —

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption; ***

(8) service performed in the employ of a religious, charitable, educational, or other organization de-

scribed in section 501 (c) (3) which is exempt from income tax under section 501 (a); ***

5. Title 36 U.S.C. Section 2, 61 Stat. 81, is set forth as follows:

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish bylaws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of sections 1, 2, 3, 4a—6, 8 and 9 of this title and promote the purposes of said organization; and the corporation created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the

brassard allowed for individuals neutralized in time of war shall be left to military authority.

6. Title 36 U.S.C. Section 7, 67 Stat. 179, is set forth as follows:

The American National Red Cross annually shall reimburse the Department of Defense for auditing its accounts, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt.

7. Title 42 U.S.C. Section 1855 a., 64 Stat. 1109, is set forth as follows:

As used in this chapter, the following terms shall be construed as follows unless a contrary intent appears from the context:***

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross.

Colorado Revised Statutes, 1963

8. Section 82-1-3 (8) (e), is set forth as follows:

Definitions.—As used in this chapter, unless the context clearly requires otherwise:***

(8) The term "employment" shall not include:***

(e) Service performed in the employ of the United States government, or a national bank or state bank which is a member of the federal reserve system, or a federal savings and loan association or a state building and loan association which is a mem-

ber of the federal home loan bank system, which institutions were, prior hereto, exempt from this chapter, or any other instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this chapter, except that to the extent that the congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this state shall not be certified for any year by the federal security agency under section 1603(c) of the federal internal revenue code, the payments required of such instrumentalities with respect to such year shall be refunded by the department from the fund in the same manner and within the same period as is provided in section 82-9-9 with respect to contributions erroneously collected.

Colorado Revised Statutes, 1963

9. Section 82-9-9, is set forth as follows:

Refunds.—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a credit memo therefor, or make a refund thereof, in either event without in-

terest thereon. In no event may an employing unit recover money paid erroneously, or other wise, which has been paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application for refund. If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof. In the event of court action no recovery of any money paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application shall be allowed. For like cause and for the same period a recovery as above indicated may be allowed on the department's own initiative.***